No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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MOTION OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, the American Association of Exporters and Importers ("AAEI") and Consumers for World Trade ("CWT") respectfully move for leave to file the accompanying brief as *amici curiae*. Petitioners have consented to the filing of this brief; respondents have not.

INTEREST OF AAEI AND CWT

AAEI represents the interests of over 1,000 United States companies nationwide, and is the only organization in the country specifically representing the interests of exporters and importers. Member companies produce, sell, and distribute a broad range of products, including electronic goods, chemicals, machinery, textiles and apparel, footwear, food, and automobiles. AAEI members also include businesses serving the trade community, such as customs brokers, freight forwarders, air and shipping lines, banks, and insurance firms. The promotion of fair and open world trade has been the primary mission of AAEI for the entire 64 years of its existence. For the reasons set forth below and in the accompanying brief, AAEI is concerned that the erroneous reasoning of the decision below would create a new, substantial, and unjustified barrier to free international trade, thereby injuring the business of AAEI members.

CWT is a national, nonprofit association devoted to promoting free international trade for the economic benefit of consumers in the United States and worldwide. CWT is a leading spokesman for the interests of consumers in opposing unjustified trade restraints such as those created by the decision below.

AAEI and CWT have direct and substantial interests in the preservation of open, competitive markets in which international traders may sell high-quality goods to consumers at reasonable prices. To this end, they have consistently opposed policies that erect protectionist trade barriers which threaten to impede import competition, and deny the American economy the benefits of unfettered interbrand competition.

In submitting the accompanying brief supporting the position of the petitioners, AAEI and CWT emphasize that they have no direct interest in the outcome of this litigation. However, they believe that the decision of the Court of Appeals for the Third Circuit must be reversed to prevent serious injury to the United States economy and the open trading system. The fundamental purpose of the antitrust laws is to foster and promote price competition. Yet the decision below—by permitting domestic producers to pursue burdensome antitrust

claims against foreign producers because the latter are selling in the United States at *low* prices—would inevitably tend to inhibit price competition. The accompanying brief addresses the concern of AAEI and CWT over the potential for misuse of the antitrust laws for protectionist purposes created by the lower court's decision. We submit that AAEI and CWT are in a better position than the petitioners or any other party to set forth the significance of the decision below upon importers generally and upon consumers.

AAEI and CWT therefore move for leave to file the accompanying brief as *amici curiae.*

Respectfully submitted,

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BRIEF OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

Pursuant to Rule 36 of the Rules of this Court, the American Association of Exporters and Importers ("AAEI") and Consumers for World Trade ("CWT") respectfully submit this brief as *amici curiae* to urge reversal of the judgments below.

INTEREST OF THE *AMICI CURIAE*

The interests of AAEI and CWT in this matter are set forth in the accompanying Motion for Leave to File Brief as *Amici Curiae.*

SUMMARY OF ARGUMENT

In this lawsuit, two domestic manufacturers have accused an entire foreign industry of engaging in a twenty-year conspiracy to destroy the American consumer electronic products industries by charging parallel low prices in the United States in violation of the antitrust laws. AAEI and CWT submit that it would be extremely harmful to the United States economic marketplace, as well as contrary to established principles of antitrust law, if low pricing—*i.e.*, behavior entirely consistent with unrestrained price competition—was deemed evidence of an antitrust conspiracy.

The decision below departs from established Supreme Court authority and threatens to deter foreign producers from engaging in the very conduct that the antitrust laws are designed to encourage. The court of appeals held that a predatory export conspiracy among foreign manufacturers may be inferred from evidence of allegedly parallel low prices, rebating, and new market entry, without regard to whether the challenged conduct is consistent with independent economic self-interest. In an ordinary competitive market, however, a new entrant charges low prices, and other competitors cut their prices to match. To view this behavior as evidence of an antitrust conspiracy is to turn antitrust law on its head. Indeed, it is behavior *varying* from this pattern that would indicate a possible conspiracy to restrain price competition. The decision below could deter aggressive price competition and cause sharp increases in the prices of imported products and of products subject to import competition—results that would be wholly at odds with fundamental antitrust policy.

In addition, we note that domestic firms being injured by low-price foreign competition have ample relief available under the United States trade laws administered by the Executive Branch. Those laws were designed to protect United States manufacturers against unfair pricing and subsidized competition from foreign producers. Moreover, the trade laws, reflecting the results of extensive multilateral negotiations, take into account the international obligations of the United States in the trade area. The lower court's interpretation of the anti-

trust laws would permit domestic firms to evade this established trade remedy system and allow them to burden foreign competitors with expensive and time-consuming litigation under laws that were never intended to erect barriers to trade.

ARGUMENT

The Decision of the Court of Appeals Misapplies Antitrust Law in a Manner that is Inconsistent with the Decisions of this Court, and Would Lead to Diminished Competition with Detrimental Effects upon Businesses and Consumers

The petitioners may be expected to argue that the judgments below are inconsistent with this Court's decision in *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968), and we agree. We suggest, however, that one need not go nearly so far as the *Cities Service* rule to conclude that what the court of appeals has done in this case is not merely wrong, but perversely wrong in a manner that threatens not only the interests of businessmen and consumers nationwide, but the system of free competitive trade that has been the foundation of American economic strength for generations.

Under the teaching of *Cities Service*, a successful plaintiff in an antitrust case must demonstrate, among other things, acts by the alleged conspirators *in contradiction of their independent economic self-interest. See* 391 U.S. at 284-88.[1] It is not enough to introduce evidence of normal, pro-competitive conduct such as low prices and market expansion, and then to ask the jury to speculate that such conduct was in fact the product of an anticompetitive conspiracy. If the evidence arrayed is equally

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[1] *See also Monsanto Co.* v. *Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1470-71 (1984) ("Permitting an agreement to be inferred merely from the existence of [ambiguous evidence] could deter or penalize perfectly legitimate conduct. . . . There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently"); *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 327 (D.C. Cir.) ("Only when the observed parallel behavior is inconsistent with the behavior to be expected from each actor individually pursuing its own economic interest may an agreement be inferred from the parallel conduct"), *cert. denied*, 459 U.S. 839 (1982).

consistent with pro-competitive and anticompetitive motivations, the plaintiff has presented no basis for allowing the case to go to a jury. AAEI and CWT believe that it would be useful for the Court to reaffirm this principle, so that competitors need not be inhibited in vigorous price competition by the fear that vexatious litigation could be brought by high-cost competitors.

Ironically, however, the instant case is *not* one in which the evidentiary record is equally consistent with pro-competitive and anticompetitive interpretations of the petitioners' conduct. All of the evidence in the record regarding the activities of the petitioners in the United States demonstrates vigorous competition, especially competition on price.[2] Indeed, the conditions in the domestic television industry which are under attack in this litigation have made it perhaps the *most* competitive industry in the United States. Robust competition on price, features, service, and quality are all pervasive throughout the American television marketplace. The $200 television set of today is in every respect a dramatically superior product to the television set of 20 years ago, which cost $500, and the credit must be given to competition.

Moreover, as a result of this wide-open competition, the United States television market has never been healthier—sales hit all-time records in 1984, and will surpass them in 1985. Nor has United States industry been shutting down because of foreign competitors. To the contrary, the last 15 years has seen major new entry into the domestic television market. Perhaps somewhat ironically, each of the petitioning companies here—Matsushita, Hitachi, Mitsubishi, Toshiba, Sharp, and Sanyo—is now a producer of television sets in the United States. Two other Japanese-based companies, two Taiwanese-based companies, and two Korean-based companies have also entered

[2] There is, however, evidence in the record to the effect that the television market *in Japan* is less than perfectly competitive, and the Third Circuit suggests that an actionable conspiracy in the United States may be inferred from such evidence. We are aware of no basis, however, for the proposition that an absence of price competition in an overseas market violates the United States antitrust laws.

into production of television sets in the United States during the period of this litigation. And respondent Zenith and RCA, of course, continue by a wide margin as the market leaders.

A foreign producer seeking to enter the United States market with an unknown and unproven product has a special incentive to respond to the demands of American customers. This is particularly true in an industry populated by large domestic suppliers such as Zenith, the products of which have achieved substantial consumer recognition and loyalty. It is, therefore, hardly surprising that such producers have found it necessary to sell at low prices and grant price concessions to break into the market. Such practices are neither sinister nor indicative of collusion; to the contrary, they constitute normal, pro-competitive behavior which should be encouraged by the antitrust laws. *Cf. Great Atlantic & Pacific Tea Co.* v. *FTC,* 440 U.S. 69, 80 (1979) ("In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices"). The ultimate beneficiary of such competition is, of course, the American consumer.

The creativity of lawyers is great, and the record of this proceeding is a testament to the ability of clever counsel to dream up arguments why almost any sort of behavior, even the most pro-competitive behavior, is really part and parcel of an anticompetitive conspiracy. Yet, to permit antitrust litigation to be brought challenging pro-competitive activity would be highly costly to consumers, in at least two ways. *First,* the cost of the litigation—and in the case of full-scale antitrust litigation, that is a cost in the tens of millions of dollars—ultimately will be passed on to consumers. *Second,* and perhaps even more important, the *in terrorem* effect of litigation may in itself deter robust competition, especially price competition. It would have been easy for the petitioners to have escaped litigation by attempting to sell inferior television sets at higher prices, yet surely that is not the result desired by society, and surely that is not the result intended to be achieved by the antitrust laws.

Accordingly, we submit that there is a need for this Court to state in the clearest possible terms that an antitrust case cannot be made out of a pattern of pro-competitive activity. *See, e.g., Buffalo Courier-Express, Inc.* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition"); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) ("We must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition"), *cert. denied*, 444 U.S. 1093 (1980). When the activity of the defendants is such as to lead to increased output and lower prices, the burden on the plaintiffs should be great to establish some basis for finding an anticompetitive agreement.

Finally, we note that if United States companies truly believe that low-price imports result from "dumping" by or "subsidies" to foreign competitors, there is ample relief available under the United States unfair trade laws administered by the Department of Commerce. *See* 19 U.S.C. §§ 1671, *et seq.* (countervailing duties); *id.* §§ 1673, *et seq.* (antidumping duties). Relief in the form of quotas or additional duties may be available even when there is no evidence of unfair competition. *See, e.g., id.* §§ 2251, *et seq.* (relief from injury caused by import competition). The trade laws were strengthened by Congress in 1979, Trade Agreements Act of 1979, 93 Stat. 144, and strengthened again in 1984, Trade and Tariff Act of 1984, 98 Stat. 2948. As the experience of the last few years has indicated, if the existing trade laws ever appear to be inadequate to secure fair trade, Congress has been ready to act. It should remain the role of the antitrust laws, however, to promote vigorous competition, not to become an all-purpose nontariff barrier to imports.

CONCLUSION

For the reasons set forth above, American Association of Exporters and Importers and Consumers for World Trade respectfully urge that the Court reverse the judgments of the court of appeals, and reinstate the judgments entered by the district court.

Respectfully submitted,

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